Supreme Court, U.S.
FILED

971601 JAN 22 1998

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

WILLIAM E. JONES, VICTOR E. JONES
and ERIC W. SNETHEN, Petitioners,

v.

UNITED STATES OF AMERICA,
DEPARTMENT OF INTERIOR,
BUREAU OF LAND MANAGEMENT,
BRUCE BABBITT as Secretary
of the Interior, Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

WILLIAM J. KOPENY
KOPENY & POWELL
A Professional Corporation
Irvine, California 92618-2933
Telephone (714) 453-2243
FAX Line (714) 453-1516
Counsel of Record for Petitioners
WILLIAM E. JONES, VICTOR E. JONES
and ERIC W. SNETHEN

45 pp

QUESTIONS PRESENTED

Whether 46 days between the publication of a Bureau of Land Final Rule, which both changes the requirements for retaining an unpatented federal mining claim, *and* makes the date for compliance 120 days earlier than it had been for the past 16 years, violates the notice requirements of the due process clause where failure to comply with these changed requirements results in forfeiture of the long held claim?

Whether the unequal treatment inherent in the Government's voluntary attempt to give actual notice of the changes in the filing date and filing requirements to all other California holders of such unpatented mining claims, and its failure to give petitioners such actual notice, results in a due process or equal protection defense to forfeiture for petitioners' failure to timely comply with the new regulations?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

OPINION BELOW 1

JURISDICTION 1-2

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED 2

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW 2-6

SUMMARY OF ARGUMENT 6-7

REASONS FOR GRANTING THE WRIT 8-20

Effect of Government's Failed Efforts to Give Actual Notice 17-20

CONCLUSION 20

TABLE OF AUTHORITIES

CASES: **PAGE:**

Atkins v. *Parker*
472 U.S. 115 (1985) 14

Bollow v. *Federal Res. Bank of San Francisco*
650 F.2d 1093 (9th Cir. 1981) 14

Celotex v. *Catrett*
477 U.S. 317, 106 S.Ct. 2584, 91 L.Ed.2d 265 19

County Line Joint Venture v. *City of Grand Prarie, Inc.*,
839 F.2d 1142 (5th Cir. 1988) 5

Evitts v. *Lucey*
469 U.S. 387 (1985) 18

Goldberg v. *Kelly*
397 U.S. 254 (1970) 18

Myers v. *Ylst*
897 F.2d 421 (9th Cir. 1990) 17, 18

North Laramie Land Co v. *Hoffman*
268 U.S. 276 (1925) 13

Texaco v. *Short*
454 U.S. 516, 70 L.Ed.2d 738 (1982) . . . . . Passim

United States v. *Locke*
471 U.S. 84 (1985) 8, 12, 14, 15, 16, 19

TABLE OF AUTHORITIES CONTINUED

STATUTES: **PAGE:**

28 U.S.C. § 1254(1) 1

30 U.S.C. § 28 2

43 U.S.C. 1744a 2, 3, 4, 5, 10

Pub. L. No. 102-381
(106 Stat.) 1374 (1992) 2, 4, 5, 6, 7, 9, 14, 17, 20

Pub. L. No. 103-66, 1993 U.S.C.C.A.N.
(107 Stat.) 312, 405-407 (1993) 10

PETITION FOR WRIT OF CERTIORARI

Petitioners, WILLIAM E. JONES, VICTOR E. JONES and ERIC W. SNETHEN, respectfully pray that a writ of certiorari issue to review the decisions of the United States Court of Appeals, Ninth Circuit, affirming the Judgment of the United States District Court for the Eastern District of California, which granted summary judgment in favor of the Government. The action below involved a claim that petitioners' unpatented federal mining claim was taken without due process because inadequate notice was given of new regulations non-compliance with which worked an involuntary forfeiture of petitioners' long held claim.

OPINION BELOW

The Opinion of the Ninth Circuit Court of Appeals was filed on August 11, 1997 and is published at 121 F.3d 1327. On September 24, 1997 the circuit court denied a petition for rehearing and suggestion for rehearing *en banc*. A true copy of the Opinion of the court of appeal and the Order denying rehearing and rehearing *en banc* is reproduced in the Appendix (App. 1-13). The judgment of the district court is also reproduced therein (App. 14-19).

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). This case comes within that provision because it involves a final judgment rendered by a United States Circuit Court of Appeals. On December 12, 1997,

the Honorable Associate Justice of this Court, Sandra Day O'Connor, granted Petitioners' application for an extension of time to file this Petition to and including January 22, 1998. This petition is timely filed pursuant to Rule 13.4 of the Supreme Court rules.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Besides the Fifth and Fourteenth Amendments to the United States Constitution, this case involves the Department of the Interior and Related Agencies Appropriations Act, 1993, Pub.L. No. 102-381, 106 Stat. 1374, 1378 (1992) (hereinafter the "1992 Act") and the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a), 30 USC § 28 (hereinafter the "1976 Act). The interpretation of the provisions of these acts is not in dispute.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The Bureau of Land Management ("BLM") ordered petitioners' unpatented mining claim, known as the "Black Prince claim", forfeited for non-compliance with changes in the law effected by the 1992 Act. Petitioners appealed to the Interior Board of Land Appeals, which affirmed the action. Petitioners then challenged the action of the government in the District Court alleging it violated their constitutional rights to due process, on the theory that the 1992 Act did not "afford [petitioners] a reasonable opportunity to familiarize

[themselves] with the [new law's] terms and to comply with it.[1], Petitioners also alleged that since the government attempted to give actual notice to all unpatented claim holders situated similarly to them (i.e., holding claims in the same region of the country as petitioners) but failed to give actual notice to petitioners, forfeiting their claim for non-compliance, where they alone were not given the benefit of actual notice, violated due process and/or equal protection.

As noted by the circuit court, under the 1976 Act petitioners were "not required to make any payments to the government. Instead, the ... [1976 Act] required an annual filing[2] ... with the BLM prior to December 31st." (App. 5, Emphasis added.) Although failure to comply with this prerequisite was deemed a conclusive abandonment of the claim under the 1976 Act, petitioners had regularly complied with these requirements "by making an appropriate and timely filing for each prior year." (App. 6).

As further noted by the circuit court, the 1992 Act suspended these requirements of the 1976 Act.

> "As a result, the requirements [petitioners] needed to fulfill in order to keep his mining claim changed and so did the deadline for meeting those requirements. Under the 1976 Act the requirements for the 1992-93 assessment year would have been

---

[1] *Texaco, Inc.* v. *Short*, 454 U.S. 516, 532 (1982).

[2] The filing requirement was met by submitting an "affidavit of assessment work" certifying that at least $100. worth of labor had been performed on each claim held during each prior assessment year. (Please see App. 5).

> met by filing an affidavit of assessment work with BLM by December 30, 1993. The 1992 Act instead required [petitioners] for the 1992-93 assessment year, to make a $100 payment to the Secretary by August 31, 1993 [or]... to comply with [other] filing requirements by August 31, 1993." (App. 6, Emphasis added.).

The $100 payment was called a "Claim rental fee" under the 1992 Act. To take effect the 1992 Act required the adoption and publication of a Rule by the Department of the Interior, Bureau of Land Management (BLM).

The "Final Rule" promulgated under the Act requiring payment of the new fee was promulgated and published on July 15, 1993 (58 Federal Register, pp. 38186-38202), just 46 days before the new, earlier, August 31, 1993 filing deadline took effect, together with the drastic penalty of forfeiture of the claim for non-compliance.

Petitioners did not file the new document or pay the new fee as required by August 31, 1993, but did comply with the requirements they believed to be in effect under the 1976 Act by performing the required labor for the 1993 season and by timely filing (prior to December 31, 1993) the Assessment Work Notice as required under the 1976 Act.

Petitioners argued that they were denied equal protection and due process because they did not have actual notice of this change in the law, that the only notice that should be considered is notice of the provisions of the "Final Rule" which was not published until 46 days before the new August 31, 1993 deadline, which was not adequate notice because it did not afford them a reasonable time to become

acquainted with and to comply with the requirements; and finally, that the government's unsupported claim that it had mailed a notice to petitioners (and all other similarly situated claim owners) advising them of the new provisions was disputed, and that since it must on summary be presumed the government failed to do so, that failure deprived plaintiffs of both due process (notice) and equal protection.

The district court granted the government's motion for summary judgment and denied plaintiffs' motions for summary judgment. The court ruled, essentially, that the notice of the new requirements in the 1992 Act was adequate because notice was given by the enactment of the act itself in October 1992, intervening notice of the proposed rule, and the publishment of the final rule on July 15, 1993. The Court further ruled that since the plaintiffs did not pay the required $100 fee by August 31, 1993, the finding of abandonment was conclusive under the 1976 Act. The Court did not rule explicitly on plaintiff's equal protection argument, but did note that no special circumstances presented in this case required the government to provide individualized notice to claim holders before extinguishing their claims. The district court relied upon a single Fifth circuit authority for the proposition that 6 months was adequate notice of a new regulation conditioning property owners interest on performance of new affirmative obligations[3] and concluded that here there was nine months notice (between October 1992 when the 1992 Act was passed by Congress and August 31, 1993, when compliance was required).

---

[3] *County Line Joint Venture* v. *City of Grand Prairie, Inc.*, 839 F.2d 1142, 1146, n.6 (5th Cir. 1988). Please see page 3 of the Order After Hearing, App. 18.

The cited case does not hold that six months is adequate notice, only that under the *Texaco* case, the plaintiff in the Fifth circuit case, a land owner who claimed he was denied due process when zoning laws were changed, was entitled to neither personal notice of the change, nor a right to be heard before the change was made law. (See 839 F.2d at 1146-1147).

On appeal Petitioner argued that the United States did not provide notice to them sufficient to comply with the requirements of the due process clause. Under *Texaco* v. *Short*, *supra*, 454 U.S. 516, 532, 70 L.Ed.2d 738, 752, to be adequate, notice must afford the property holder a "reasonable opportunity to familiarize itself with the terms [of a new rule] and to comply" with it.

The circuit court rejected these arguments without a reasoned analysis of the issues presented.

SUMMARY OF ARGUMENT

Petitioners urge this Court to grant Certiorari and to rule that the United States did not provide adequate notice to them to comply with the requirements of the due process clause. Under *Texaco* v. *Short*, *supra*, 454 U.S. 516, 532, 70 L.Ed.2d 738, 752, to be adequate, notice must afford the property holder a "reasonable opportunity to familiarize itself with the terms [of a new rule] and to comply" with it. Here, several facts make the notice afforded plaintiffs inadequate, including: (1) Since 1976 the annual renewal filing date for holders of such claims was December 31, and the district court acknowledged in its ruling that the 1992 Act advanced the filing date to August 31; (2) Neither the enactment of the

1992 Act, itself, nor the notice of the proposed "Final Rule" were notice of the actual law that applied to this case, only the Final Notice, published just 46 days before the August 31, 1993 deadline actually required the payment of the Rental Fee by the new, earlier filing date; (3) After the BLM voided plaintiffs' mining claim, Congress enacted yet another law pertaining to such claims in which the name of the new fee required under the Appropriations Act for 1993 was changed from the misleading "Rental Fee" to "Claim Maintenance Fee"; (4) In this case, the government did find it appropriate to have its BLM California State office send postcards and a fact sheet flyer to each mining claim holder on BLM's computer records, which should have included plaintiffs, but plaintiffs did not get it.

In addition, where, as here, the government volunteers to provide a higher level of procedural protection from a change in rules affecting property rights than may be required by minimum due process standards, failure to provide a member of the group of property holders who are adversely affected by the rule change that higher level of protection, violated equal protection. Where, as here, there was a bona fide factual dispute whether petitioners were among those to whom the government did not afford that higher level of actual individual notice of the new rules contained in the Appropriations Act for 1993, the district court should not have decided the case against plaintiffs on summary judgment, but should have afforded them a trial of the disputed fact. If petitioners establish they were not given the individualized notice afforded to all others in their position vis. the relevant mining claims, the decision to void their claim for non-compliance with the new regulation violated equal protection.

REASONS FOR GRANTING THE WRIT

In *Texaco* v. *Short*, *supra*, 454 U.S. 516, 532, 70 L.Ed.2d 738, 752, this Court held that due process requires adequate notice of the type of rule contained in the 1992 Act. In that case, a state statute cut off the mineral mining rights of parties who had not used those interests for a period of 20 years. The act in question provided that such unused interests automatically lapsed and reverted to the surface owner unless the mineral rights owner filed a statement of claim in the local recorder's office. This act is remarkably similar to the 1992 Act as to petitioners' unpatented mining claim. An unpatented claim is a right to mine minerals in certain land while the title to the land itself remains with the government. *United States* v. *Locke*, 471 U.S. 84, 86 (1985).

The factors listed above compel the conclusion that the notice given here was inadequate under *Texaco*.

Also, the fact that the government undertook to give individual notice of this change in the law triggers a duty not otherwise required by the due process clause, to give such actual notice to plaintiffs. The due process clause and the equal protection clauses, themselves, require equal and fair treatment of the property interests of citizens similarly situated. This means there is a requirement of equal application of rules or practice to people similarly situated, even though the particular practice or treatment itself may not be constitutionally required.

Petitioners have been held to have forfeited their unpatented mining claim, held for many years prior to a 1992 change in federal law, because they did not comply with a requirement of which they were not aware.

Contrary to the view of the government and circuit court expressed below, that change in the law came about by means of a statute enacted in October, 1992 and by means of regulations published in the Federal Register on July 15, 1993 -- *just 46 days before the regulations took effect on August 31, 1993.* Without the publication of the later "Final Rule" the law would not have taken effect.

This last period of 46 days is relevant to the fundamental due process question presented, i.e., whether the change in the law did "afford the citizenry a reasonable opportunity to familiarize itself with [the new law's] terms and to comply with it." *Texaco, Inc.* v. *Short*, 454 U.S. 516, 532 (1982).

The opinion below states "...in this context we find the date on which the final regulations were issued irrelevant." (Slip Op. at p. 9524, App. 10). The opinion explains that this is because petitioners "had absolutely no room to expect the regulations to stray from the explicit terms of the 1992 Act" which dictated the contents of the regulations. The only explanation of the "irrelevance" of these factors is that (1) appellants are presumed to have notice of statutory changes that affect their claim; (2) even though the notice period in the *Texaco* case was 2 years, (and as the opinion below concedes, petitioners had at most 9-11 months), since petitioners knew their claim was subject to prior regulations, they would be more likely to become aware of a change in the law in that 9-11 months than would people holding property never before subject to regulation to become aware of a law giving them 2 years notice.

This analysis is so far from a reasoned consideration petitioners' point that this Court's writ should issue if only to give all those adversely affected by the 1992 Act clear

guidance regarding the viability of their due process claims. Petitioners did not ever argue that the relevance of the date of the regulations was that until the regulations were issued they could reasonably think the regulations under the 1992 Act might differ from the Act, itself. Rather, petitioners have always maintained that because the issuance of the regulations was a legal prerequisite to the forfeiture, i.e., because the Act was not self-executing, but required the issuance of the regulations to become effective, the Governmental action that required petitioners' compliance became effective too late to give them a reasonable opportunity to become familiar with the fact that the Act was actually effective just 46 days later.

Of course petitioners had no reason to anticipate a regulation that differed from the statute -- they were ignorant of the statute itself. As the opinion concedes, petitioners had always complied with the requirement of the (prior) 1976 Act, and they fully intended to keep their mining claim by continuing to comply with any requirement imposed upon them. They did not know about this one, and it only became operative with the issuance of the Regulations by the Bureau of Land Management, just 46 days before the August 31, 1993 deadline for compliance with the new regulations.[4]

---

[4] In addition, after the BLM voided plaintiffs' mining claim, congress enacted yet another law pertaining to such claims in which the name of the new fee required under the Appropriations Act for 1993 was changed from the misleading "Rental Fee" to "Claim Maintenance Fee." The "Omnibus Budget Reconciliation Act of 1993" changed the name of the new fee from a "rental fee" to a "maintenance fee." (Pub. L. No. 103-66, 1993 U.S.C.C.A.N. (107 Stat.) 312, 405-407 (1993). While this new act did not apply to the plaintiffs claim because it had already been voided administratively when the new act was effective, the change in the name is a circumstance which suggests the old name for the new fee was misleading.

No case law, statute, or other precedent is cited by the panel below for its highly subjective opinion that the date of the issuance of the regulations which actually had the effect of imposing the rules found in the October 1992 statute is *irrelevant* to the due process question. Certainly the *Texaco* case the panel states "defeats Jones' claim" does not address this issue.

Nor is *Texaco Inc.* v. *Short*, *supra*, a case in which owners of a claim were in the habit of meeting annual requirements on December 30 of each year under a law that had been in effect for 16 years, only to have both the substance of the annual requirements changed *as well as the date for compliance changed* in the same new rules.

Below, the government made a policy argument based on the assertion that the changes in the Act were designed to "eliminate stale claims and to reflect claimholder's serious intent to develop a claim." The changes cited were the suspension of a requirement that the claim holder state under oath that at least $100. worth of assessment work had been done to develop the claim with the payment of a $100. fee, which Petitioners concede is a "*de minimis* rental fee."

Requiring claim holders to pay a *de minimis* fee, rather than actually working their claim each year may or may not bear a rational relationship to the stated goal to "eliminate stale claims and to reflect claimholder's serious intent to develop a claim" as argued by the government. Nevertheless, there can be no doubt that moving the compliance date up from December 31 to August 31 on only 46 days notice could only have the effect of catching many serious claimholders unawares[5], and working a forfeiture of

---

[5] For example, there was evidence presented below that many

claims of many persons the government argues the Act was not designed to reach.

Reliance on *United States* v. *Locke*, 471 U.S. 84 (1985) is surely misplaced.[6] The passage quoted from *Locke* by the government below states that "as the claimants had already made one filing under the Act, 'they know, or must be presumed to know, of the existence of the Act and of their need to inquire into its demands.'" That argument might be persuasive if the petitioners here paid the $100. fee by August 31, 1993, but then failed to pay the fee the next year. These are not the facts of this case.

Here, however, petitioners (and similarly situated claim holders) were lulled into thinking that whatever the new requirements of the Act might be, they would have until December 31 to learn about and comply with them. Precisely the same factual considerations which persuaded the Court in *Locke* to find the notice to be adequate makes the notice here inadequate. For here, it may be said, (to paraphrase *Locke*), "as the Claimants had made many filings under the December 31 deadline, but never been required to make a filing under the new, earlier August 31 deadline, they did not know, and could not be presumed to know that whatever substantive changes the Act made in their

---

serious miners would be in the field working their claims for longer than 46 days at a time and they would be unlikely to even hear about the change in the compliance date in time to obey the act to protect the claim they are seriously working.

[6] The court below cited *Locke*, *supra*, and *Texaco, Inc.* v. *Short*, 454 U.S. 516 (1982) for the proposition that in light of the "pervasive regulation" of these claims, petitioners received a reasonable opportunity to familiarize themselves and comply with the general requirements imposed by the Act.

compliance requirements, it would also require them to act sooner than had ever been required, under penalty of forfeiture of their claim."

Nor does *Texaco, Inc.* v. *Short*, *supra*, 454 U.S. 516 supply a fair basis for arguing that merely passing the legislation involved here constitutes reasonable notice for the purpose of the due process clause. In *Texaco* there was a two year grace period, not present in the Act or regulation promulgated under it, and this Court in *Texaco* "did not indicate what time frame might be inadequate."[7]

Respondents' argument that since the Act's changes in the obligations of a claim holder are not "drastic," therefore the "shorter grace period provided in the 1992 Act. . . is appropriate"[8] is a *non-sequitur*. A small, or non-drastic change in the requirements are more likely to be missed by those they affect, and receive far less attention in the media or the public in general. Moreover, there is no

---

[7] Citation to *North Laramie Land Co* v. *Hoffman*, 268 U.S. 276 (1925) is also unavailing. If the quotation from that case, to the effect that "all persons are charged with knowledge of the laws that affect their regulated property rights" were the rule, there would be no reason for the government to admit, as their language cited above does, that some "time frame might be inadequate." Actually, the *Hoffman* language quoted re-enforces petitioners' argument since its holding hinges on the proviso that a procedure in a law regulating property must not be "unreasonable or arbitrary." Here, the change in the date for compliance, which might not have been arbitrary, was unreasonable when coupled with the short period allowed for claim holders to become aware of the change.

[8] The period the government claims is provided is 11 months. While petitioners claim the period was actually only 46 days, which was not a reasonable period, even 11 months (or any period shorter than a year) would violate due process in light of the history of years of a December 30 compliance date.

claim that the $100. rental fee is "drastic," but only a claim that failure to give adequate notice of any requirement the non-compliance with which works a forfeiture of the claim, violates due process. Why should the degree of the change have any rational relationship to the amount of time that is reasonable for the claim holder to learn about the change? Obviously, in this case there was never a claim that petitioners did not have time to raise the $100. rental fee, only that they did not have a reasonable time to learn of the requirement, or that it was due three months earlier than the law had ever before required a claim holder to act to protect his or her claim.

Cases holding the mere publication of a statute gives notice are unavailing because in those cases the statutes, themselves, created the requirements under consideration and worked the loss of property for failure to comply. Here, the 1992 Act was not self-executing. It had no effect on the mining claims unless and until the regulations were promulgated pursuant to the act, just 46 days before the August 31 filing deadline.[9]

Reliance on what the government claims to be "shorter grace periods" than the 2 years approved in *Texaco, Inc.* v. *Short*, *supra*, or the three years approved in *Locke*, *supra*, also misses the mark.[10]

---

[9] For this reason, the argument that "publication in the Statutes at Large of the Act Itself, ..., alone satisfied due process requirements" *Bollow* v. *Federal Res. Bank of San Francisco*, 650 F.2d 1093 (9th Cir. 1981), is inapposite.

[10] *Atkins* v. *Parker*, 472 U.S. 115, 131 [90-day grace period prior to the change in a household's foodstamp allotment.] also cited below was hardly analogous to the change in the law here since (a) it did not necessarily work a permanent deprivation of benefits, since the

In the *Texaco* v. *Short* case, the statute under consideration allowed the mineral rights holders a two year "grace period" in which to file their statement of claim, and further provided that the claim could be filed within a 60-day period after receiving actual notice of lapse. This Court held these safeguards met the standards of notice required by the due process clause because they "afford[ed] those within the statute's reach a reasonable opportunity both to familiarize themselves with the general requirements imposed and to comply with those requirements." (*Id.*)

Two years later, in a factually inapposite case, this Court called the requirements set out by the Court in *Texaco* the "minimal requirements" of due process. (*United States* v. *Locke*, *supra*, 471 U.S. at 108). Presumably, in the context of the present case, since these minimal requirements have not been met by either the 9-11 month notice (claimed by the government and circuit court), or the 46 day notice between the time of the Final Rule and the effective date of forfeiture, petitioners are entitled to due process relief.

Finally, the government's characterization of the 46 days (or even the claimed 11 months) notice given under the Act here as a "grace period" is misleading. In *Locke*, the Court considered a state law that actually gave the property owner two years after the effective date of the act to bring himself into compliance and set aside the loss of the property right involved. In this case there was no such grace period. The holding of the court below was that once the claim holder was out of compliance with the requirements of the law, their claim was lost - forever.

---

circumstances in a household are subject to change and (b) the allotment was not a "property right" analogous to the mineral rights held under the mining claim of petitioners.

In the Act there was no "grace period" at all as that term was used in *Locke*. Rather, there was a statute enacted that provided that regulation be promulgated to require payment of a fee on the very next August 31 after the enactment and publication of the statute, which was 11 months hence. Those regulations were promulgated just 46 days before the August 31 deadline, and there was not one day of grace period. BLM ruled that the notice was adequate, but that if the fee was paid one day late, the property (i.e., the mining claim) was lost forever. Had there indeed been a 90-day grace period in this regulation, allowing revival of the mining claim if the fee was paid by December 31 of the first year to which the new regulation required under the Act applied (i.e., 1993), the government's claim that the notice was reasonable under *Locke* and *Texaco* might have more appeal, and petitioners' claim would never have been forfeited.

None of the authority cited by the Federal Respondents holds that earlier publication of procedural legislative antecedents to a law or rule or regulation that will deprive a person of property upon the non-payment of a new fee serves to shorten the time which the property owner is entitled to under the due process clause for the notice to be constitutionally "reasonable."

Petitioners believe Certiorari should be granted to determine what the effect of a change in law imposing different requirements *and moving up the date for meeting those new requirements*, in combination, has on the due process notice analysis required by the *Texaco* decision.

Effect of Government's Failed Efforts to Give Actual Notice

Even if actual notice is not independently required by the constitution, if the government establishes and generally complies with a practice of giving actual notice for the dissemination of this particular regulation, the forfeiture of petitioners claim following failure to give that same actual notice to them, who are similarly situated to those should be held to violate both due process and equal protection.

Most of the California unpatented mine claim holders similarly situated to petitioners were mailed individual notice of the new provisions of the 1992 Act.

In this summary judgment proceeding, however, there was conflicting evidence whether petitioners were mailed that notice. In fact, all petitioners submitted Declarations that they did not receive the notice, and the other evidence failed to corroborate the government's claim that this mass mailing to all such mine claim holders actually was sent to plaintiffs.

Nevertheless, the fact that the government undertook to give individual notice of this change in the law should be held to trigger a duty not otherwise required by the due process clause, to give such actual notice to petitioners. The due process clause and the equal protection clauses, themselves, require equal and fair treatment of the property interests of citizens similarly situated. This means there is a requirement of equal application of rules or practice to people similarly situated, even though the particular practice or treatment itself may not be constitutionally required. While no case known to counsel applies this principal to a case such as this one, the principle has been applied in other contexts. (See e.g., *Myers* v. *Ylst*, 897 F.2d 421 (9th Cir.

1990. E.g., While there is no constitutional right to appeal, once a state provides the right by statute, it must be fairly and evenly afforded to all similarly situated, or due process is offended. (See *Evitts* v. *Lucey*, 469 U.S. 387 (1985). See also *Goldberg* v. *Kelly*, 397 U.S. 254, 262 (1970) [no constitutional right to welfare, but once instituted, must be applied evenhandedly and fairly].)

Obviously the government acted to head off precisely the argument that is being made by petitioners here because it was manifestly unfair and unreasonable to conclude that serious mining claim holders who had been submitting their statements of compliance with the former requirements of the statute every year on December 30 since 1976, would have a fair opportunity to learn that they had to pay a $100 fee every year beginning on August 31, 1993 under the (new) 1992 Act.

The government's conduct in attempting to supplement the notice on which they now rely as adequate "presumed" notice, is a factor this Court should consider in determining that the notice to petitioners (who did not receive actual notice) was inadequate under the due process test.

Since this case is before the Court on a summary judgment ruling, the evidence is not in on whether or not the address in the BLM computer data base for Petitioners was wrong, or lost, or whether the government's claim that it sent actual notice out to all claim holders in that database is accurate.

What is clear, however, is that there was an allegation and evidence before the District Court that (1) the Government sent out notice to many California claim holders; and (2) Appellants who are California claim holders did not receive it. Although the government appears to discount this allegation, or try to explain it by hypothesizing that perhaps Appellants did not have their correct address listed in the data base, those matters have not been established, nor would they be proper to consider in the procedural posture of this case. Summary judgment is only appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex* v. *Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2584, 2552, 91 L.Ed.2d 265.

In light of the record, the issue before this Court is whether or not the government must comply with the equal treatment aspect of the due process clause when it undertakes to give actual notice to many members of a group of claim holders, but fails to give it to one in Appellants' position who thereafter fails to learn of or comply with the new regulation in time.

Petitioners believe the principle is akin to that which is well established in other contexts. Even though there may be no federal constitutional right to "actual notice" (*Locke*, *supra*), once the BLM adopted a policy to give actual notice to its California claim holders, it acquired a due process (or equal protection) duty to give it to all of them, including Petitioners.

This Court is urged to hold that summary judgment could not be granted the government in the face of an equal protection and due process claim, where, as here, there was an unresolved factual dispute whether plaintiffs were treated

similarly to the other California mine claim holder who received individual notice of the new requirements of the 1992 Act.

CONCLUSION

For all these reasons, this Court is urged to grant the writ and reverse the judgment of the lower courts.

WHEREFORE, Petitioner prays that this Honorable Court grant this Petition and issue its Writ of Certiorari.

Respectfully submitted this 26th day of March, 1998

WILLIAM J. KOPENY
KOPENY & POWELL, P.C.
8001 IRVINE CENTER DRIVE
SUITE 1170
IRVINE, CALIFORNIA 92618-2933
(714) 453-2243; (714) 453-1516

Counsel of Record for Petitioners William E. Jones, Victor E. Jones, and Eric W. Snethen